IN THE COURT OF APPEALS OF TENNESSEE
FOR THE MIDDLE SECTION, AT NASHVILLE

In re: Sentinel Trust Company	)	No. M2005-01073-COA-R3-CV
	)	Lewis Equity No. 4781

APPEAL FROM FINAL JUDGMENTS OF THE LEWIS COUNTY CHANCERY COURT AT HOHENWALD, TENNESSEE

Brief for Appellants

Semtinel Trust Company, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien

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Oral Argument Requested

Table of Cases and Other Authorities

NOTE: Pursuant to the Court's order the it would take judicial notice of the record in an earlier case of the same style, No. M2005-00031-COA-R3-CV, record references to that case's record begin with the record abbreviation *R., and this case with R.,

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Appellants' Brief

I.

ISSUES PRESENTED FOR REVIEW

Question No. 1: Whether the proceedings in the chancery court regarding Sentinel Trust Company (a trust company acting primarily as indenture bond trustee under over two hundred bond-indentures) were within its jurisdiction in light of all applicable constitutional (both Tennessee and U. S.) and statutory provisions cited herein, when—

(i) the law purporting to empower the Commissioner of Financial Institutions (hereinafter, Commissioner) to seize a financial institution, impose receivership thereon, remove corporate directors, take over the operation of the institution's business, and invoke chancery jurisdiction for limited purposes therein stated (hereinafter collectively referred to as "seizure powers") does not provide that such powers and jurisdiction may be exercised over trust companies, but only over state banks having

depositors and other specifically-named types of institutions,

(ii) even if seizure were conditionally authorized *(e.g.,* were authorized for exercise against a non-depository trust company without banking powers), no due-process hearing upon charges was afforded Sentinel Trust Company prior to the seizure of its properties, and the statute under which the Commissioner claimed to act did not empower him to so seize an institution without prior hearing except where necessary to protect the interests of depositors, and Sentinel does not come within this exception as a trust company that never had authority to accept deposits nor ever had any depositors,

(iii) the Commissioner's factual claim that Sentinel had become insolvent was false, both as a matter of universal knowledge and as shown by affidavit, by his rationale that Sentinel's **assets *held in its fiduciary capacity*** constituted **liabilities** and by his disregard of the multiplying effect of monthly interest compounding on such assets to be held, to the extent collected, for the benefit of trust funds, *e.g.,* for the benefit of the bond-issuers,

(iv) the Commissioner's claim of seizure activity powers over a non-bank trust company because of actions pretended by him to be breaches of Sentinel's fiduciary obligations is without legal foundation, because the enforcement of such obligations is solely a judicial power and not within the Commissioner's statutory authority, not only for a trust company, but even for a *bank in its exercise of fiduciary powers,* over which charged breaches the Tennessee Banking Act gives him no authority; and

(v) the powers claimed and *de facto* exercised by the Commissioner not being authorized by the plain language of the statutory provisions he invoked, it is not possible, by actually following the Tennessee law of statutory construction, to construe the statutes invoked by the Commissioner to empower him to exercise bank seizure powers over a non-bank and non-depository trust company.

Question No. 2: Whether the statute under which the Commissioner claimed to act, the Tennessee Banking Act, apart from the foregoing, is unconstitutional on its face, because it attempts to vest in the Commissioner, a member of the Executive Department of Tennessee's government, certain powers which may be vested only in the judiciary, including the judicial power to appoint receivers, the judicial power to remove corporate directors, and the judicial power to bring about the dissolution of a corporation for insolvency, as well as the legislative power to make provisions of the Tennessee Banking Act applicable or inapplicable to non-banking corporations, at his pleasure

Question No. 3: Whether, even if a trust company is within the Commissioner's seizure jurisdiction, whether the Court can properly empower the Receiver to convey Sentinel's realty, when its ownership is vested in the corporation and the Receiver has received sufficient moneys from collateral liquidations so as not to justify its determination to alienate Sentinel's real property, and whether approval of the Receiver's agreement to convey corporate realty in Davidson County was proper, being as *(i)* the Receiver has no property interest therein, *(ii)* the Receiver was not validly appointed by the order of any court of record so as to empower it to convey corporate properties, and *(iii)* the Receiver did not obtain an evaluation based upon the legal standard for property evaluation, but only an estimate of a reasonable "asking price."

II.

STATEMENT OF THE CASE

Nature of the Case:

There were no pleadings in the case, nor any litigation, in the normal procedural sense, because no complaint was filed, no leading process issued, nor any defendants sued, nor was any property seized by court order so as to create *quasi in rem* jurisdiction. The Commissioner, claiming to have seized and taken over the operation of Sentinel Trust Company under statutes purporting to create these

powers and empowering the Commissioner to exercise them over **state banks** under his own authority, T.C.A. §§ 45-2-1502 and 45-2-1504, required him to submit, for the local Chancery Court's approval, a series of discrete, specifically-described decisions made by him, which particular decisions the local Court is empowered to approve or disapprove by T.C.A. §45-2-1502(c)(2), 45-2-1504(a)(1)–(3), 45-2-1504(f), and 45-2-1504(g).

Course of the Proceedings:

All issues brought before the Chancery Court by the Commissioner or the Receiver he in fact appointed, purportedly under the authority of(b), were claimed to have been presented to the Court under no statutory authority except the provisions T.C.A. § 45-2-1502, *et seq.*, unless presented under instructions of the Commissioner[1] for which he cited no statutory authority.

Appellants appeared, through counsel, at the first hearing held by the Court upon a motion by the Commissioner's Receiver and stated certain objections and their legal position for the Court's consideration as continuing objections in ruling upon that pending motion and all subsequent motions that might be made, so that the Court could consider them in its future rulings (June 29, 2004 TR.,*R.,Vol. XI, pp.11-18) also filing an authenticated copy of the sworn Petition for *Certiorari* and *Supersedeas* they had filed in the Davidson County Chancery Court as an exhibit **(Ex. 1).**[2] They appeared through counsel at another hearing (July 12, 2004 Tr., *R.,Vol. XII) and filed sworn objections with supporting exhibits (*R.,987-1122) to the motion to transfer some of Sentinel's trust accounts and some of its assets, and argued the same (Nov. 15, 2004 Tr., *R.,Vol. XIII).

Repeated motions not relevant to this appeal were processed, until finally, there were

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[1]There was no statute purporting to empower the Commissioner to enlarge the local court's statutory jurisdiction beyond that enacted by the Legislature.

[2]Further references to that exhibit are followed, where needed by italicized references to its *exhibits* to that petition and its *attachments,* being supporting affidavits.

motions that eventuated in two final judgments (*R.,IX:1133-1195, X:1240-1244) from which an appeal was taken to this Court, *In re: Sentinel Trust Company,* Lewis Equity No. M2005-00031-COA-R3-CV, which has been briefed and consolidated for argument with this case and another appeal.

A motion was then filed May 2, 2005 asking the Court to approve the Receiver's agreement to sell Sentinel's office property called its "Bellevue Property" (R., 2) to which Sentinel's directors filed objections (R., p. 31), on which the Court heard argument (R., Vol. II–Transcript) .

Decision of Chancery Court:

The Court entered final judgment approving the sale on May 20, 2005 (R., p. 49), from which an appeal was taken to this Court by timely notice and appeal bond, not in the record because the record was abbreviated by stipulation (R., 52).

III.

STATEMENT OF FACTS

In addition to the relevant facts of events occuring before the Bellevue Property Sale Motion, summarized below, the isolated facts on the motion consisted of unsworn "factual" allegations in the motion itself, with no supporting affidavit to the truth of the statements therein and attached exhibits identified in the motion, plus two supporting affidavits as exhibits, but without any affidavit verifying any allegations within the motion itself, as is often done and is authorized by Rules 6.049(2) and 43.02, T.R.Civ.P. The supporting affidavits. Exhibits B and C, were of Realtor Shirley Zeitlin (R., I:16-19) and Jeanne B. Bryant, President of the corporate receiver (R., I:20-21). The exhibits also include Exhibit E, an excerpt from a transcript of an earlier hearing before Judge R. E. Lee Davies, (R., I:23-24), authentic because it is a copy from the entire transcript earlier filed.

The unsworn exhibits having the appearance of validity were a copy of the contract to sell

the property (Exhibit A, R., I:9-15) and an unauthenticated copy of a memo (Exhibit F, R., I:25-30) from a former attorney for Sentinel to a lawyer within the Department (R., I:5). To the extent relevant to Appellant's argument, these are most conveniently described in the argument itself.

Concerning facts appearing before this motion was filed, the Court by now knows that the proceedings involve the Tennessee Banking Act, T.C.A. Title 45. Chapters 1 and 2, which had newly-formed trust companies under its authority since 1980, but was amended by Chapter 112, Public Acts of 1999 to bring under the Commissioner's authority the pre-1980 state trust companies previously exempted from the Department's regulatory authority. The Court also knows the case involves the Commissioner's seizure of a trust company and subsequent acts aimed toward its liquidation under claim that this trust company seizure was authorized by statutory authority to seize and liquidate a "State bank," requiring him to file a notice of the seizure in the local court, without any factual record or allegations, followed by requirements that certain of his actions, including sale of the State bank's property, must be submitted to that court for approval, so the post-seizure record in such cases is of a series of separate approval hearings.

Because the Commissioner is not required to present any underlying factual justification to the court in which he files his seizure notice, most of the facts[3] relevant to the issues on this appeal are in the limited sworn filings by these appellants, or other objecting parties, made in the Chancery Court, plus a smattering of facts gathered from the numerous motions filed, with the initial filings by the Commissioner in the Chancery Court being mere formal notices (*R.,I:1, 3),[4] the Commissioner's filings not contain-ing—nor required to contain—even the Statement of Charges

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[3]It is believed that the record reveals no real difference (or conflicting evidence) as to the facts, but only as to inferences that should be drawn from the indisputable facts. Affidavits by Sentinel's controlling owner Bates, based upon Sentinel's pre-seizure records and computations made as described within such affidavits are within the Commissioner's power to check and refute, if erronious, as the Commissioner holds control of all Sentinel's records and has personnel with the qualifications to check, duplicate, and either confirm or refute the computations, and no such refuting affidavits have been filed by the Commissioner.

[4]These references are to the volume and page numbers of the Technical Record.

against the allegedly insolvent financial institution which led to the seizure.

Facts Established by Filings:

The a copy of the sworn petition for *Certiorari* and *Supersedeas* filed in the Davidson County Chancery Court was received in evidence as an exhibit **(*R., Ex. 1)** in the Court below without objections and, as it may be referenced in arguments, contained legal theories with appropriate references to constitutional and statutory provisions asserted to be controlling, and necessary to an understanding of the facts and issues. It also contained factual allegations and supporting documentation in the form of exhibits of evidentiary documents or instruments, and attachments of supporting affidavits, and these are summarized below in what is hoped to be the most orderly way for any reader's convenience.

Facts re: Sentinel's Normal Business Operations and its Developing Difficulties—

Since long before Sentinel was brought under the administrative authority of the Director of Financial Institutions by the 1999 legislation referenced above, it has been a Tennessee corporation authorized by its corporate charter to engage in business as a trust company, *i.e.,* it received moneys in trust from trust settlors to be held and disbursed for trust beneficiaries, as distinguished from the operations of a bank, which receives deposits that create the debtor-creditor relation, T.C.A. § 45-1-103(3), (9), and (10), so that the deposits are the bank's own money which it can invest for its own profit without sharing with depositors, to each of whom it owes only the obligation to repay the balance of the deposit immediately upon demand with such interest, if any, as accrued under the agreement between the bank-debtor and its depositor-lender **(*R., Ex. 1, ¶¶** 3-4, pp. 3-4).

Continuing after it came under the provisions of the Tennessee Banking Act on July 1, 1999, Sentinel's business was serving as trustee, registrar, and/or paying agent under bond indentures governing bond issues by private corporations, by municipalities, and by private-activity entities issuing tax-exempt bonds under the sponsorship of cities or counties whose public credit was not pledged **(*R., Ex. 1,** ¶ 13, p. 10). For the most part, these monies were deposited in a pooled trust

fund (as the Commissioner accurately characterized it) held at SunTrust Bank in Sentinel's name in a checking account and another account holding securities in the name of Sentinel Trust Company, but Sentinel's books accurately showed the name of the trust issue owning[5] each security and in the checking account, the name of each trust fund, and the amount held by it, which amounts made up the total in the pooled trust fund.

Many of the tax-exempt private-activity bonds issued under the names of government entities as authorized by federal law were driven into insolvency when 1997Congressional changes in Medicare reimbursement rights destroyed their income, so that some 63 bond issuers went into default over the following years, obligating Sentinel to seek to liquidate their collateral through litigation; Sentinel had worked through **all but 13 of these defaulted issues** by the time of the seizure actions of May 18, 2004 (***R., Ex. 1,** ¶ 14, pp. 10-11).

In all litigation and other collection activities, Sentinel charged all expenses against the appropriate bond fund and defaulted bond issue, so that payments came out of that issue's total funds in the pooled bond funds until that defaulted fund ran out of money, and from that point forward, they were treated as overdrafts, resulting in negative balances, and Sentinel maintained that was the way such expenses were handled by bank trust departments (***R., Ex. 1,** ¶ 14). Inasmuch as the negative balances in each overdrafted account (on Sentinel's books) produced an actual reduction of the amount of "cash" [6] held in the SunTrust "pooled trust fund," Sentinel had to assure that there was proper accounting so the pooled trust fund would not lose any money.

To achieve this, Sentinel at all times credited each bond fund holding a cash (positive)

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[5]Of course, the actual ownership was that Sentinel owned legal title to the funds, which were equitably owned by the bondholders and bond-issuers, each of which would be entitled to the refund of its sinking funds and other unused moneys after payments to all bondholders.

[6]This was not actually "cash" but credits, because most of every bank's money is invested and its limited legally-required "reserves," are deposited in a Federal Reserve Bank except for the limited amounts of "vault cash" required for its cash transactions (***R., Ex. 1,** ¶ 3, p. 3).

balance with earnings at the rate of the average daily earnings of the entire fund as credited by SunTrust each month. As to each overdraft, from the moment it occurred, that account incurred an additional monthly charge of 1½% per month which therefore compounded monthly because the monthly charge increased the negative balance, this being in accordance with its formal schedule showing all fees and charges (***R., Ex. 1,** ¶ 17, p. 12 and **R., Ex. I).* In effect though not in form, this was the same as the "pooled bond fund"—admittedly a non-entity—"lending" the amount of the overdraft to each default fund in overdraft status at a charge of 1½% per month compounded monthly.

With the time-consuming requirement of liquidation litigation, the compounding monthly charge increased the overdraft balances far above the amounts of actual moneys spent, so that over a 5-year period,[7] the asset owned by Sentinel in its fiduciary capacity, *e.g.*, by the "pooled fund," would be more than double the amount of the informal "loan" so that a $500,000 overdraft, if repaid 5 years later, would result in the fund receiving the $1,221,609.89 required to "zero out" the overdrafted account (***R., Ex. 1,** ¶ 17, p. 12, and *R.,1074-1075, ¶ 6). This was apart from the separate fees in Sentinel's list of fees, and it furnished a measure of protection against the possibility of Sentinel's inability to liquidate collateral on some individual bond issues for enough money to overcome that issue's negative balance—of which negative balance, the actual amount of money borrowed was necessarily only a fraction, likely a small fraction, of the negative balance due to the compounding effect, and after liquidation of all negative balances, any profits will be the property of the pooled fund, to be apportioned between all the bond issues that were never in default *(id.)*. After seizure, with Sentinel having no access to its records, it alleged that the remaining cumulative total of all overdrafted balances on the 13 issues still undergoing liquidation was $7.5 million, but the Commissioner's charges of May 3, 2004 stated that as of April 30, 2004, Sentinel had estimated the total negative at $7.25 million (*R., Ex. 1, ¶ 1(a), p. 2, **R., Ex. A,* ¶ 17, p. 6). The

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[7]This is not an unreal example, because five years had passed since the defaults occurred mostly in 1999, and the 13 remaining issues in liquidation were necessarily of long duration.

Commissioner viewed this *asset* held by Sentinel in its fiduciary capacity as a *liability* of Sentinel in its corporate capacity *(ibid., *R., Ex. A* at Part III, pp. 6-7). Sentinel alleged that the most practical way to collect these assets and zero out the negative balances was to continue pursuing liquidation work through litigations, as had been done successfully in the past on over 50 defaulted issues, with Sentinel recognizing that it would have to pay the remaining deficiency, if any, upon completion of liquidation on all the remaining 13 defaulted accounts **(*R., Ex. 1,** ¶ 17, p. 12).

To offset the booked negatives—partly cash pay-outs and partly compounded monthly charges thereon, Sentinel had earned fees which it had booked as paid of about $2.5 million[8] plus earned added fee entitlements against the 13 remaining overdrafted issues, which it had not yet bothered to enter on the books of about $3.5 million, so that its approximately $6 million in fee entitlements overcame much of the cumulative approximately $7.25 million negative balance **(*R., Ex. 1,** ¶ 17, p. 12), of which more than half was uncollected interest that was an asset of the trust fund, whether collectable or not.

Although the sworn effects of interest-compounding as set out above is a matter of universal knowledge that every court judicially knows, Sentinel filed an affidavit of an expert of unquestionable qualifications,[9] Robert V. Whisenant, whose highly factual affidavit proved that Sentinel was not insolvent when the Commissioner seized it, his affidavit furnishing a total factual response to three questions, "*(i)* whether financial reports by recognized accounting firms establish, under generally-accepted accounting standards, that Sentinel had become insolvent, when

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[8]This was alleged to consist of checks actually written to Sentinel for earned fees but not cashed **(*R., Ex. 1,** ¶13, p. 18). While the record herein does not show it, a corrective affidavit was filed in the *certiorari* court, and a later sworn filing in the local Court clearly identified this approximately $2.5 million as charges booked—actually entered against the appropriate defaulted issue so that they could be charged, to diminish its cash balance or increase its overdraft, if any (*R.,978 *et seq.* at *R., Ex. A* thereto, *R.,997, ¶ 14).

[9]His *vita* includes not only his previous appointment by Tennessee chancery courts, and his many years' experience as a CPA and a Certified Valuation Analyst; he is also president-elect of the Tennessee Association of Certified Public Accountants (*R.,1079-1080)

considered with the factual allegations in the Commissioner's Statement of Charges, *(ii)* the accurate characterization and quantification of certain funds held by and Sentinel Trust Company in relation to its possible insolvency and *(iii)* whether the facts demonstrated any possibility of the existence of an emergency 'threatening serious loss to depositers' at the time the Commissioner seized Sentinel Trust Company." (*R.,1073).

Mr. Whisenant explained that the over $7 million in "accounts receiveable" were an **asset** of Sentinel in its fiduciary capacity, and neither an asset nor a liability in its corporate capacity, but that Sentinel had no entitlement to such assets which belonged to the trust funds, along with any profits on the 1½% monthly-compounding interest earnings, upon collection. (*R.,IX:1074, ¶ 4); he set out the interest-compounding formula and explained that the compounding factor would double the total of receivables due the fund in 47 months, more than triple it in 74 months and more than quadruple it in 94 months (*R.,IX:1074, ¶ 5) and he vouched for the absolute accuracy of Mr. Bates' methodology in computing the actual total of cash used that was embedded within the overdraft negative totals (*R.,1075, ¶ 6), which Bates had computed at $3,167,678 (*R.,VIII:993 ¶ 17) of the approximately $7.25 million "Receivables," and thus included over $4 million profit[10] from the compounding, contingent upon collection.

Mr. Whisenant explained in great detail and totally convincingly why it was impossible to assume, from the "Receivables" asset of overdraft balances on the day of seizure, that Sentinel would *ever* be indebted for any money because of the uses of such trust funds to carry out its fiduciary collection obligations (*R.,IX:1075-1076, ¶¶ 7-8) and explained why, with Sentinel receiving moneys monthly from bond issuers and paying out semi-annually (on dates staggered throughout the year) to bondholders, "I perceive no accounting reason to conclude there was any cash flow problem or inadequacy of cash resources as long as the non-defaulted bond-issuers continued timely to their required payments into the trust funds. This is true because bond issuers are required by the bond indentures to pay in each year the amount of money required to be distributed to bondholders, and

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[10]$7,250,000 - $3,167,678 = $4,082,222.

if any bond issuer fails to do so, this is a default of the issuer, not the trustee." (*R.,IX:1077)

As to the methodology of Sentinel's (and Mr. Bates') computations, Whisenant said, "The accounts of this methodology in computing and crediting interest entitlement of any funds, and the balance with the computed 1½% monthly compounded overcharge balances, if inaccurate, could be disproven in minutes by the Commissioner's employees from Sentinel's computer records." (*R.,IX:1077, ¶ 9). The Commissioner never, at any time, tried to disprove the accuracy of these computations and the starting data (from Sentinel pre-seizure records) on which they were based.

In a new affidavit Mr. Bates executed in November, 2004,[11] he set out his computation's result that the "current overdrafts" total in the "accounts receivable" of approximately $7.25 million was only $3,167,178.00 of cash "borrowed," and he gave data and the resulting computations from the Receiver's reports to the Court below that after seizure, the Receiver had recovered the sum certain of $2,116,806.65 that should be credited to the overdrafted balances (*R.,IX:1118, ¶ 5).

Bates swore, with reference to those and other named bond-issue collections by the receiver that he mentioned, that they totaled about $6,719,179.29, of which "$3,161,665 should have been applied to reduce overdrafts receivable with about $3.6 million becoming available for bondholder distribution. However, based upon admissions by Vivian Lamb in her deposition, a separate account was set up [by the Receiver] at SunTrust Bank to receive funds after May 18th, but I have seen no reports to the Court to indicate the deposits and withdrawals in this account. The reported collections reduced current overdrafts but the funds have not been credited [by the Receiver] to the 'pooled account.' " (*R.,1119 ¶ 6).

Bates computed that the total fees the receiving banks would receive in the future from the transfer of Sentinel's business as $7, 212,503.83, of which $2,706344.90 would go to the Bank of Oklahoma and $4,506,148.94 to SunTrust of Georgia which had agreed to accept this business

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[11]This was filed in opposition to the Commissioner's decision to transfer all Sentinel's trust non-defaulted trust accounts, that is, all the profit-generating ones, to other banks.

without bidding for it when the Commissioner earlier tried to sell the accounts. (*R.,IX:1118, ¶ 3).

After such investigative or examining acts as may have occurred, on May 3, 2004, the Commissioner served charges and a Cease and Desist Order upon David E. Lemke, Esq., of Waller, Lansden, Dortch & Davis, PLLC (hereinafter, "Waller-Lansden"), then Sentinel's leading counsel (***R., Ex. 1,** **R., Ex. A* thereto, first page, followed by the Statement of Charges). The Statement of Charges stated it was issued under the authority of T.C.A. §§ 45-1-107(a)(1), (a) (3), and (c) (***R., Ex. 1,** *Ex. A* thereto, Stmt. Of Chgs., Part I, p. 2),

The Charges then alleged, *inter alia,* that ***(i)*** Sentinel was a trust company subject to regulation by the Commissioner since July 1, 1999, and that the Commissioner had *begun* an examination of it on *June 16, 2003 (Ibid.,* Part II, p. 2, ¶¶ 3-4); that ***(ii)*** in March, 2004, the Department had received a copy of an audit by Sentinel's auditor, Kraft Bros., for the year ending December 31, 2002, saying that Sentinel had fiduciary accounts receivable of around $7.5 million from collection efforts on defaulted bond issues, that Kraft could not determine the existence, amount, or collectability of these receivables, and that Kraft could not determine what liability, *if any,* Sentinel might incur upon ultimate resolution *(Ibid.,* Part II, pp. 3-4, ¶ 10); that ***(iii)*** the Department had sent a letter to Sentinel on April 5, 2004, requesting a legal opinion on Sentinel's funding collection work on overdrawn defaulted issues from the pooled fund of all bond issues *(Ibid.,* Part II, pp. 4-5, ¶ 13); and that ***(iv)*** this led to a meeting requested by Sentinel's counsel, Waller-Lansden, at which Waller-Lansden attorneys admitted that the method of paying legal expenses to fund Sentinel's required collateral-liquidation work was "inappropriate," *(Ibid.,* Part II, p. 5, ¶ 14), but asked if Sentinel could continue paying fiduciary expenses that way, anyway, which request the Commissioner declined to approve *(Ibid.,* Part II, pp. 5-6, ¶ 15).(There was no finding that Waller-Lansden attorneys represented that they were authorized by Sentinel to make admissions against its legal interest.) This was followed by charges summarized below, as repeated in the Cease and Desist Order.

The Statement of Charges did not contain any allegations that Sentinel's condition was such

as to endanger the interests of its "depositors," which it could not have alleged, because a trust company does not have depositors.

The Statement of Charges informed Sentinel that an Emergency Cease and Desist Order was being issued simultaneously and ordered Sentinel to file an answer within 30 days or else the Emergency Order would become Final *(Ibid.,* Part V, pp. 7-8).

Sentinel filed a timely Special Appearance, Statement of Special Defenses, and Answer with the Commissioner (***R., Ex. 1,** *Exh. H* thereto), with detailed statutory, constitutional and factual assertions of reasons why the Commissioner lacked the authority he claimed and as to allegations of Sentinel's conduct. It specifically denied that the Commissioner was empowered by statute to exercise **any** of these powers against a trust company, as distinguished from a state bank. *(Ibid., Exh. H,* pp. 1-6).[12]

The Cease and Desist order issued May 3, 2004 (***R., Ex. 1,** *Ex. B* thereto) charged, primarily, that Sentinel was operating in "an unsafe and unsound manner by using the pooled fiduciary funds to provide operating capital for non-related defaulted bond issues" *(Ibid.,* p. 5, ¶ 1), creating a shortfall of $7.25 million as of April 30, 2004, an amount greatly exceeding its operating capital. Without finding that there was any endangerment to "depositors," or even that Sentinel was eminently insolvent so as to jeopardize the interests of its clients and creditors, the instrument then Ordered Sentinel to cease and desist from "using the pooled fiduciary funds to provide operating capital for non-related bond issues" and that it likewise cease from doing a large number of other acts[13] without the Commissioner's prior written approval.

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[12]Such Statements of Charges and Cease and Desist Orders, where authorized, are the only types of acts by the commissioner as to which administrative hearings may be instigated by him; all others are reviewable only by *certiorari.* T.C.A. §§ 45-1-107(c) and 45-1-108 (a).

[13]These included agreeing to sell any corporate assets, to transfer any fiduciary accounts, engaging in any transactions in *any* accounts, either fiduciary or its own, of more than $50,000.00, making any changes in management or any increases in salaries, etc. *(Ibid.,* p. 5, ¶¶ 2-6 and 8).

In addition to these prohibitions, it then made mandatory order that Sentinel, its directors, officers and employees "take [listed] affirmative actions:". These included the ordered infusion of $2,000,000.00 additional capital within 2 weeks, and submitting to him within 2 weeks a plan to "completely replenish the fiduciary pooled" deposit account and at the same time outline steps it would take "to provide sufficient operating capital (as determined by the Commissioner)." *(Ibid.,* pp. 7-8, ¶¶ 1-2), and to provide a spread sheet with quantities of information on all trust accounts by the next day *(Ibid.,* p. 8, ¶ 3).

The Commissioner seized Sentinel, utilizing armed officers, on May 18, 2004 **(Ex. 1,** ¶ 1(c), p. 2, issuing brief notices giving the primary stated reason to be its failure to infuse capital as mandatorily ordered on May 3, 2004 (*R.,I: 3, ¶ 3). The more detailed order simultaneously entered appointed as a receiver both a corporation and its president and ordered that all of Sentinel's named officers are "prohibited and enjoined from the transaction of further business of STC; . . ." and from doing a long list of other acts the Commissioner enjoined, **(*R., Ex. 1,** *Ex. C* thereto, pp. 3-4, ¶ D).

IV.

SUMMARY OF ARGUMENT

Because the many basic points of law involving Constituions, Statutes, purported findings, and basic issues of power are so intertwined, the most orderly way to discuss these is to explore the substantive law and to refer back to each appealed question against the understanding so determined, because each of the questions raised on appeal answers itself.

These legal and factual issues include: Did the Commissioner have the power at all to exercise bank-seizure powers over a non-depository trust company? Aside from this, did he withhold action pending his affording a constitutionally-secured prior hearing? Did he meet the statutory requirements for acting destructively without a hearing? Did he make the necessary findings without which he is not even colorably authorized to take such actions? Were the issues he submitted to the

Court below within its jurisdiction to resolve? Was there any rational basis for **assuming** that Sentinel's acts were Banking-Act violations, and for treating its **fiduciary assets** as corporate **liabilities?** Is there any possible way to demonstrate that a statute purporting him to take acts against **a state bank,** a phrase with a common and understandable meaning for centuries, empower him to use those same powers against a totally different type of entity, a **trust company,** if the answer is provided by thinking that uses the only legally-approved rationale for answering such a question, the law of statutory construction? In answered right and by law, each must be answered against the Commissioner's destuctive seizure and exercise of powers.

V.

ARGUMENT

Bank Insolvency and Jurisdictional Separation:

The greatest emergency calling for rapid government action in economic matters is sudden knowledge of the failure of banks, whereby depositors lose all their money. Secrecy is essential until government can bring the emergency under control, so the public will not know of the hazard and make a run on the bank. Every deposit creates the debtor-creditor relation, but if a bank has fiduciary powers, it, like a trust company, holds not only its own money but other moneys that it holds in trust, and such moneys are the property of trust beneficiaries and not of the financial institution. Hence in the event the financial institution becomes insolvent, such moneys are immune from ownership or right of control by an insolvent fiduciary's receiver or trustee in bankruptcy, *Caplin, Trustee, v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972), and *Wagner, Trustee v. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S.W. 245 (1909). *Wagner* expounds and enforces the difference between trust money which the bank does not own and deposited money which the bank does own as debtors of its depositors.

Under these authorities, Sentinel Trust Company, if insolvent and subject to properly-

commenced insolvency procedures, would suffer the possible loss of its own moneys held in its separate account at Union Planters National Bank in Hohenwald, which amounted to $147,854.76 upon seizure (R., IX:1089, ¶ 4), but the funds it held in trust were not its property, and were thus immune from the powers of any bankruptcy or insolvency trustee or receiver.

Whenever a bank actually becomes insolvent, depositor losses are inevitable but for the limited FDIC deposit insurance protection. The reason is that it is the business of *every bank* to create and lend money it doesn't actually have: Not only does it lend, over time, the full amount of cash its depositors have on deposit, whose payment ("withdrawal") they have the absolute right to demand without prior notice, but the creation of new deposits and the inflow of periodic loan repayments is so steady and reliable that the bank can lend far above the total of its deposits, which added loans will create a much larger inflow of cash, all in amounts much greater than needed to pay out in the form of cash upon the presentation of checks in the normal daily range.

The protection of depositors' rights is the basis of such emergency bank-seizure laws as here involved. The enacted statutory scheme governing these procedures very carefully vest all real powers of decision in the Commissioner of Financial Institutions, and shield him from judicial interference by empowering him to make the most important decisions solely on his own authority—to seize, to appoint a receiver, to decide to liquidate.

Insolvent Bank Administration:

When a bank becomes insolvent, its giant pool of funds are the money borrowed from its depositors, mingled with all its moneys from other sources which must be kept separate for the orderly administration of claims. If Sentinel were a bank—and if any bank were insolvent—and had its own funds held in another financial institution, subject to no liens, such moneys, as the $147,854.76 that Sentinel had in its corporate account at Union Planters, would be its money, subject to be used by the Commissioner to pay his receiver and his and its employees in administering the receivership, as authorized by T.C.A. § 45-2-1502(f) as "necessary and reasonable expenses of the

commissioner's possession of a state bank and of its reorganization or liquidation [which] shall be defrayed from the assets thereof."

When these are exhausted, the Commissioner is free to use his departmental money, which is not a part of the state treasury, or ask court approval to borrow from a Federal Reserve Bank, as provided by T.C.A. § 45-2-1502(c)(2) (referenced *supra,* p. 21, ¶ *(i).* He is free to "borrow" from Departmental funds because these result from "assessments" he collects from each branch bank to a maximum of $5,000.00 annually, the unused portion of which is refundable to those banks, T.C.A. § 45-1-118(c) and (d)(2). But the statute requires that after all claims are filed, these borrowings by the Commissioner from Departmental funds or from a Federal Reserve Bank loan shall *then* be repaid to the Commissioner as having first priority ahead of all other creditors, including depositors, T.C.A. § 45-2-1504(h)(1)(A).

Even the Commissioner's pretense that Sentinel violated his Cease and Desist Order represents his disregard for law, because such orders are negative, as in a restraining order, not mandatory, as in a mandatory injunction. No statute empowers him to affirmatively order a trust company to infuse additional capital. He is not even empowered to order a **bank** to do this. See T.C.A. § 45-1-107(e). Nor is he empowered to order a trust company to abandon practices that may arguably be breaches of trust, because the enforcement of such breaches is for the courts, and the substantive laws on this subject are not within the Commissioner's enforcement powers. These Title 35 provisions governing fiduciary breaches are committed to the enforcement of the chancery courts, and particularly T.C.A. § 35-3-117(j)(1), which caps liability at the maximum of payments missed by trust beneficiaries who were entitled thereto, and Sentinel's "borrowing" practices did not cause a single bondholder to miss a single interest payment.

Careful consideration of the explicit powers given the Commissioner and the local Court make it clear that the Court's orders beyond the statutory grant are void and can furnish no legitimation when the Commissioner acts beyond his statutory powers.

Statutory Construction Consideration—Commissioner's Powers over a Trust Company:

Some of the main rules of statutory construction were recently re-stated by the Supreme Court in *Wilkins v. The Kellogg Company,* 48 S.W.3d 148 (Tenn., 2001), which included the following comments:

"[The] premise [that a statute be construed favorably to employees doesn't warrant a court's 'amendment, alteration or extension of its provisions beyond its obvious meaning'] is simply a specific application of the most basic rule of statutory construction: **courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it."** (48 S.W.3d at 152; emphasis added). This prohibits judicial amendment of a statute by changing "bank" to mean "bank or trust company," and equally prohibits drawing legislative intent from other than the body of the statute, absent clear ambiguity. Repeated statements that the Commissioner is empowered to do destructive acts to **state banks** furnish no basis for *de facto* judicial amendment adding trust companies to that term, especially when the statute elsewhere defines the word "bank" as including "trust company" for some sections but for none other.

"In attempting to accomplish this goal [of statutory construction], courts must keep in mind that the 'legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose.' *Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).* 'Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.' Id." *(Ibid,;* emphasis added). So when the Legislature says the Commissioner's powers over **trust companies** should include the one specified power of examination **for a limited and defined 3-year period,** it is rationally impermissible to conclude that this expresses a grant not only of the examining power, but of **all other** banking-related powers to be freely exercised over trust companies.

In addition to these rules of construction summarized by the Supreme Court, when there is an amendatory statute, as here, the "mischief rule" applies, authorizing construction, where needed, to suppress the mischief and give effect to the remedy the legislation sought to make available. With the rule that all words must be given their normal meaning, the Legislature is given notice that if it wants to enact something, it must choose the appropriate words, and not leave the meaning of the enactment to the power-enlarging imagination of some executive. The well-known canons of construction require that the reader be literate and that the reader must allow and compel the words enacted to actually enter his thinking process and must use common sense, respecting the fact that words in a single instrument must be given uniform meaning.

The long and short of it is that if the Legislature wanted to create new powers over trust companies, it must use the words "trust company" in relation to any particular grant of power. The *stare decisis* determination of this point was made by *Madison Loan & Thrift Co. v. Neff,* 648 S.W.2d 655 (Tenn.App., M.S., 1982). Defendant Commissioner's self-serving assumption that emergency bank liquidation powers must be given to him to exercise over trust companies as well is belied by the words of the legislation: If this had **any** rational basis, the Legislature would not have enacted that Defendant Commissioner is empowered to exercise his bank-examining powers over every trust company newly coming under his authority for a limited period of only three years, from July 1, 1999 through June 30, 2002. This would be totally pointless and absurd if the Commissioner were empowered to exercise perpetually over every trust company each power he is empowered to exercise over every state bank. The Commissioner is bound to honor every statute he is sworn to uphold.

Previously, when the Legislature wanted to empower the Commissioner to exercise bank-seizure powers over other types of entities, it amended T.C.A. § 45-1-103(3) to enlarge the definition of a bank ("any person . . . doing a banking business"[14]) by adding that for the purposes of

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[14]This doesn't include trust company, which does not and can not accept deposits, and no checks can be drawn against the moneys it holds in trust.

"supervision, examination, and liquidation" the word "bank" also includes "industrial investment companies and industrial banks . . ." The Legislature surely knew it could insert at that point the words "trust companies" as included in the word "bank" but the Legislature did not do so. It surely knew it could provide express language defining "bank" as including "trust company" as it has done in T.C.A. § 45-2-1001(c)(1) "for the purposes of this section and T.C.A. §§ 45-2-1002–45-2-1006".

The Legislature elected not to insert such phraseology to *drastically change and enlarge* the powers of the Commissioner over *every trust company,* both those under his authority since 1980 and those newly subjected to his authority by the 1999 Act. No court is empowered to amend this legislation by inserting words that would make it mean what the Commissioner wishes it meant. But the Legislature did look at one of those listed powers, that of "examination" and deliberately enacted that the Commissioner can exercise that power over trust companies for only a limited 3-year period. **This grant of power had expired** before this Commissioner did his final "examination."

But there is another aspect of statutory construction, in that the Legislature **did** consider and enact a special provision relating alone to trust companies, not banks, whether those trust companies newly came under his general policing authority in 1999 or had already been subject to his charter-approval and regulatory authority since 1980.

This is in regard to ending corporate existence or selling all corporate assets, and the Tennessee Banking Act has long empowered the Commissioner to seize an insolvent bank, and has prescribed with great particularity how he shall do it and the scope of his powers, T.C.A. § 45-1-107, 45-2-1502, and 45-2-1504, with the terminal provision that when all the liquidating and accounting have been achieved, the bank's "charter shall be cancelled." T.C.A. § 45-2-1504(k).

But to back up, aside from *quo warranto* and administrative forfeiture of a corporate charter for failure to file required reports, the general corporate laws provide for surrender of a corporate charter and the corporation's dissolution upon a filing approved by a majority of the corporation's

stockholders. The 1999 Amendment[15] provides that it amends these two chapters of T.C.A., thereby subjecting it to the entire Code's basic rule for construction, which says: "If provisions of different titles or chapters of the code appear to contravene each other, *the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter.*" T.C.A. § 1-3-103 (emphasis added).

This says in the plainest possible language that the general statute on corporations governs the termination of corporate existence and the sale of all the corporation's assets, except where other provisions specifically provide different methods in special cases, *e.g.,* administrative charter forfeiture, *quo warranto,* and the termination of a banking corporation's existence by operation of law under T.C.A. § 45-2-1504(k). The searcher is led to these different parts of the code, but they say nothing different about involuntarily ending a trust company's existence or divesting it of its assets by seizure.

But that subject was taken up **by the 1999 Act** as the appropriate way to divest an insolvent trust company of its properties and business under the Commissioner's official oversight and without its stockholders' consent. That provision is codified as T.C.A. § 45-2-1021.

This codification incorporates part of Chapter 112, § 10, Public Acts of 1999. It empowers a trust company's board of directors to vote to sell all of the corporation's assets "without shareholder approval . . .", T.C.A. § 45-2-1021(a), but permits this result **only** with the Commissioner's approval, and it requires the Commissioner make specific findings to authorize such liquidation.[16] This is followed by provisions of T.C.A. 45-2-1021(b) of precise requirements of such

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[15]Of which the Attorney-General has provided the Court both a copy and the full legislative history, which pretty much revealed the legislative thinking that whatever this bill provides, it was written by the Department of Financial Institutions, and is what they want. So much for the *actual* legislative intent.

[16]The required findings by the Commissioner for dissolution by the Board without stockholder approval are:
"(1) Interests of the state trust company's clients and creditors are jeopardized because of

final asset sale.[17] This was the Legislature's enactment, and its *only* enactment dealing with the problem of possible trust company insolvency.

If the legislature wanted to grant to the commissioner the power to exercise these sweeping and destructive bank-liquidation powers over a trust company, which holds no deposits as its own property, but only funds in trust for others, the Legislature was obligated to so enact. Absent the enactment, the Commissioner has no power to insert additional words into the enactment, nor does any Court.

This destructive power, whose creation **in some form** is essential for control of the banking business, because the business is essentially one of a private company creating an equivalent to currency from money that does not exist, and when credit becomes tight and many of a bank's creditors cannot pay their notes or instalment payments, this has repeatedly led to a lack of public confidence, causing a "run" on banks and loss of depositors' money.

But to apply these powers in such a precipitous and dictatorial manner to a trust company which had already successfully managed the recovery from insolvency of over 60 bond issuers whose bonds went into default, is not defensible. The law does not authorize it and no court should judicially legislate to support the Commissioner's usurpation of powers never granted to him.

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insolvency or imminent insolvency of the state trust company; and

"(2) Sale is in the best interest of the state trust company's clients and creditors."
T.C.A. § 45-2-1021(a)(1) and (2)

[17]"(b) A sale under this section must include an assumption and promise by the buyer to pay or otherwise discharge:

"(1) All of the state trust company's liabilities to clients;

"(2) All of the state trust company's liabilities for salaries of the state trust company's employees incurred before the date of the sale;

"(3) Obligations incurred by the commissioner arising out of the supervision or sale of the state trust company; and

"(4) Fees and assessments due the department."

Finally, the rule of *expressio unius* plainly applies. For the enforcement of all the banking laws against banks and trust companies as well, the statute points the Commissioner to the Davidson County Chancery Court's remedial powers, in whatever part of the state the bank, trust company, or other financial institution may be situated, T.C.A. § 45-2-107(a)(6), and provides an exception of direct, sudden, and forcible action against banks approaching failure, proving there are no other exceptions. It conditions this exceptional power on threatened harm to **depositors,** but in the alternative mode of terminating a trust company's accounts without consent of their stockholders, it points only to the interests of the trust company's clients and creditors being jeopardized, T.C.A. § 45-2-1021(a)

It would be senseless to grant such sweeping business-seizure powers to be used against trust companies when they **must** be granted over banks, because banks keep so little cash in relation to their deposits. This is controlled by federal law,[18] which requires a minimum percentage of cash "reserves," partly in "vault cash" but mostly deposited in a Federal Reserve Bank, as a credit that can immediately be converted into cash to meet every demand that can be reasonably foreseen. The maintenance of this reserve is a mandatory requirement imposed upon every federally-insured bank 12 U.S.C. § 461(b)(2) (that is, in practical effect, every bank).

But there is *no statutory requirement,* either federal or state, that a trust company have *any* such reserve, there is no need for such a requirement. The reason there is no legal requirement for a cash reserve imposed upon trust companies, as distinguished from banks, is that the huge sums of money are held in trust, are not money of the corporate trustee, and form no part of the equation for determining if insolvency (the inability to pay debts as they accrue in the normal course of business) has occurred. So long as a bond-indenture trust company can borrow enough money occasionally to meet its operating expenses (payroll, supplies, utilities), it will never have to pay out trust money except to its beneficiaries from money monthly or semi-annually remitted from bond-issuers.

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[18]These Federal statutes are cited and their provisions are described in detail, **Ex. 1,** ¶ 3, p. 3.

With Sentinel, by the sworn allegations, paying out over $100 million a year to bondholders, this does not represent any obligation upon Sentinel to pay out even as much as 1¢ of its own money. If a bond issuer on any issue should withhold paying the required monthly or semi-annual amounts into trust, Sentinel would just properly withhold paying the semi-annual interest instalments to bondholders, declare the issue in default, and commence liquidation proceedings against the collateral. When the negative balances of trust fund overdrafts in Sentinel's bond-issuer accounts were at its highest level, at any point when its own earned moneys were in a high cash amount, its directors could have declared a dividend for the rest of Sentinel's non-committed money, and could have sold its trust business, with or without Sentinel's corporate properties. Each month fees from its bond issues produced income for monthly operations and required little or no liquid capital. After all, millions of dollars were received and disbursed each month, averaging about $8⅓ million dollars a month, so there was a lot of cash to assure liquidity to fulfill current trust obligations. These were the obligations of the bond-issuers to transmit to Sentinel the monthly or semi-annual payments required by their bond indentures.

If the reserve requirements that are essential for every bank were imposed upon Sentinel, with its $100 million or more in transactions every year, it would have had to keep a cash reserve of $9,750,000 (see **Ex. 1,** ¶ 3, p. 3, and federal statutory citations therein). This would be absurd and arbitrary. This would mean that Sentinel would have to deposit it in a bank or banks so the banks could enrich themselves by earning high interest rates while paying its depositor the customary low interest rate of around 1%± per annum.. It is an accepted principle of statutory construction in Tennessee law: "It is presumed that the Legislature in enacting [any] statute did not intend an absurdity, and such a result will be avoided if the terms of the statute admit of it by *a reasonable construction.*" *Epstein v. State,* 211 Tenn. 633, 641, 366 S.W.2d 914, 918 (1963).

The lack of need and lack of hazard are demonstrated by the Whisenant affidavit (summarized *supra,* p. 12), and by the fact that Sentinel had a years-long history of overcoming the negative overdraft balances in liquidating all but 13 of the 63 defaulted bond issues. To reach the

construction the Commissioner **assumed,** without foundation, is to disregard the law of statutory construction. If that law be applied, it cannot be concluded that "bank" doesn't mean "bank," and that powers the Commissioner is authorized to exercise only over banks, he may also exercise over non-banks not subject to the hazards of banking.

Plainly, the Tennessee Banking Act uses the clearest language to empower the Commissioner to seize an insolvent **bank,** T.C.A. § 45-2-1502(b)(2), with no mention of seizing a trust company, to liquidate an insolvent **bank,** T.C.A. § 45-2-1504, with no mention of liquidating a trust company, to remove from office individual directors of a **bank,** T.C.A. § 45-1-107(b) on specific and narrow grounds,[19] with no mention of powers to remove a trust company's directors. The legislative text contains no explicit grant of such powers to the Commissioner over trust companies. Yet there are numerous provisions of the Tennessee Banking Act that apply directly to trust companies by their own terms, others that apply to banks by their own terms, others that apply to the Commissioner, giving him some powers over named types of entities but not over other types, and the list goes on and on.

Every legislative act is required to be construed as a whole, not by a glance at a single isolated provision, every legislative grant to an official of specific powers over otherwise free people or companies is required to be construed **against** broadening those powers beyond the specific statutory language, *Gallagher v. Butler,* 214 Tenn. 129, 140, 378 S.W.2d 161 (1964), are to be construed with common sense, *Arinki v. State,* 168 Tenn. 393 (1934), and each word (and the omission of related words) is to be given its rational effect, *Tidwell v. Servomation-Willoughby Co.,* 483 S.W.2d 98 (Tenn., 1972), *Reynolds Tobacco Co. v. Carson,* 187 Tenn. 157, 164, 213 S.W.2d 15 (1948)..

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[19]This statute empowers him to remove a *bank* director "who becomes ineligible to hold such position or who, after receipt of an order to cease under subsection (a), violates the provisions of this title or a lawful regulation or order issued thereunder, or who is dishonest." There was no showing or finding that any of Sentinel's directors did any of these three things.

There is only one reason for accepting the distorted "construction" that Defendant Commissioner desires: To save him the embarrassment of having abused the trust placed in him by the appointing power by seizing powers not even arguably vested in him if the statute is construed in accordance with the applicable body of law, the law of statutory construction.

The foregoing general discussion of the points of law furnishes the correct answers to the specific questions raised on appeal, each of which Appellants now consider briefly.

The Specific Questions on Appeal:

***Question No. 1*: Whether the proceedings in the chancery court regarding Sentinel Trust Company (a trust company acting primarily as indenture bond trustee under over two hundred bond-indentures) were within its jurisdiction in light of all applicable constitutional (both Tennessee and U. S.) and statutory provisions cited herein, when— *(i)* the law purporting to empower the Commissioner of Financial Institutions (hereinafter, Commissioner) to seize a financial institution, impose receivership thereon, remove corporate directors, take over the operation of the institution's business, and invoke chancery jurisdiction for limited purposes therein stated (hereinafter collectively referred to as "seizure powers") does not provide that such powers and jurisdiction may be exercised over trust companies, but only over state banks having depositors and other specifically-named types of institutions,**

***(ii)* even if seizure were conditionally authorized *(e.g.,* were authorized for exercise against a non-depository trust company without banking powers), no due-process hearing upon charges was afforded Sentinel Trust Company prior to the seizure of its properties, and the statute under which the Commissioner claimed to act did not empower him to so seize an institution without prior hearing except where necessary to protect the interests of depositors, and Sentinel and Sentinel does not come within this exception as a trust company that never had authority to accept deposits nor ever had any depositors,**

***(iii)* the Commissioner's factual claim that Sentinel had become insolvent was false, both as a matter of universal knowledge and as shown by affidavit, by his rationale that Sentinel's assets *held in its fiduciary capacity* constituted liabilities and by his disregard of the multiplying effect of monthly interest compounding on such assets to be held, to the extent collected, for the benefit of trust funds, *e.g.,* for the benefit of the bond-issuers,**

***(iv)* the Commissioner's claim of seizure activity powers over a non-bank trust company because of actions pretended by him to be breaches of Sentinel's fiduciary obligations is without legal foundation, because the enforcement of such obligations is solely a judicial power**

and not within the Commissioner's statutory authority, not only for a trust company, but even for a *bank in its exercise of fiduciary powers,* over which charged breaches the Tennessee Banking Act gives him no authority; and

(v) **the powers claimed and *de facto* exercised by the Commissioner not being authorized by the plain language of the statutory provisions he invoked, it is not possible, by actually following the Tennessee law of statutory construction, to construe the statutes invoked by the Commissioner to empower him to exercise bank seizure powers over a non-bank and non-depository trust company.**

The first absolute in Federal due process jurisprudence is that a state cannot seize private property without a prior meaningful hearing on the merits to determine that it is empowered to so take the property, *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Grannis v. Ordean,* 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), *Armstrong v. Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

In this case, the Commissioner plainly seized Sentinel without any prior evidentiary hearing upon previously-framed issues, but only a confrontation at which the Commissioner demanded actions according to the "law" he laid down. The Supreme Court has recognized that in spur-of-the-moment types of actions, as by a police officer or prison guard whose superiors cannot possibly know in advance what his actions will be, or in great emergencies, it must suffice if a post-action due process hearing is provided reasonably soon after the fact, *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965), as distinguished from more deliberate, formal, and planned state action, which must be based upon the record of a *prior* hearing. *Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Here, the law specifically empowers the Commissioner to act after grounds for bank-seizure have been established, T.C.A. § 45-2-1502(a),[20] but not without a prior hearing. But the Legislature

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[20] "The commissioner may take possession of *a state bank* if, *after a hearing,* the commissioner finds:

has provided a specific and narrow exception—adequate to pass *federal* constitutional muster—for the Commissioner to seize a **state bank** without a hearing: He is so empowered whenever he concludes that "an emergency exists which *will result in serious losses* ***to the depositors,*** the commissioner may take possession of a state bank without a prior hearing." T.C.A. § 45-2-1502(c) (emphases added).

But this exception cannot apply to what the Commissioner described as a non-deposit institution (***R., Ex. 1,** *Ex. G* thereto), which has no depositors and has never had a depositor. This is a studied and reasonable pre-condition to the exercise of power which is plainly justified because of the perilous condition of banks when they fail.

There being no statutory authority, whose pre-conditions are met, for Sentinel's seizure, it simply does not accord with the law of the land, and thereby accord Sentinel due process of law. The concept and *meaning* of due process of law had their origin and meaning at the time of American Independence, hence derived from the common law, in the older phrase prohibiting the taking of one's life, liberty or property but by the law of the land. This older phraseology for due process is written into Tennessee's Constitution (Art. I, § 8 and Article XI, § 16). Its very earliest origin was in the 39th Chapter of *Magna Carta,* which an English king was compelled by force of arms to sign the year 1215:

"39. No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land."*

Pound, *The Development of Constitutional Liberty* (Yale Univ. Press, 1957; Emphasis added).

"(1) Its capital is impaired or it is otherwise in an unsound condition;

"(2) Its business is being conducted in an unlawful or unsound manner;

"(3) It is unable to continue normal operations; or

"(4) Its examination has been obstructed or impeded."
(Emphases added)

Tennessee adopted the purer and older language rather than the then-modern catch-phrase, but its meaning had remained unchanged since 1215, over a half-millinium before our Declaration was made to the world.

Its meaning was simply that government—legislative, executive and judicial—is obligated to follow the existing law when it forfeits one's life, liberty, or property: The property of Sentinel and of its stockholders, who indirectly owned everything Sentinel owned.

The most widely-recognized authority on the state of English law was Blackstone's Commentaries published in 1765. He wrote of the *judicial* due process obligation:

> **"The Courts: Due Process of Law.** It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by the authority of parliament."[21]
>
> I BLACKSTONE, COMMENTARIES, § 197, pp.*141-*142 (Jones ed., 1915).

Upon incorporation of a second due process clause into the Fourteenth Amendment to bind state governments, this had the core meaning that each state must accord *due process of state law* in inflicting such deprivations, *Dent v. West Virginia,* 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908). Although the Eleventh Amendment is a formidable barrier to federal judicial enforcement of the Due Process Clause, and although the U. S. Supreme Court has imaginatively expanded the clause's meaning where it appears in both amendments, into highly particularized narrow applications, that Court has never tried to declare its underlying meaning destroyed. Both the Amendment's Due Process Clause and Tennessee's law of the land clause require that government follow the law (perhaps subject to such parts of the common law as the *de minimus* doctrine) in destroying Sentinel's business and property.

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[21]Such meaning is reflected in holdings of the U. S. Supreme Court, that the words of the Due Process Clauses ". . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' " *Dent v. West Virginia,* 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889).

This means *all* of Tennessee's relevant law, including its constitutional prohibitions against executives ever exercising judicial power and judges ever legislating by effectively inserting words not enacted or deleting words enacted,[22] because our Law of the Land Clause is a part of the Declaration of Rights, as to which the following effect is given:

> **Sec. 16. Bill of rights to remain inviolate.** — The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate."
>
> Constitution, Art. XI, § 16

As one long-departed member of the Tennessee Supreme Court wrote, where the Constitutions language is plain, it is not required to be interpreted, but to be obeyed. That such is still the law is demonstrated in the concurring opinion[23] of then-Justice Drowota in *Summers v. Mayor Robert L. Thompson,* 764 S.W.2d 182, 188 (Tenn., 1988), with extensive discussion of the necessity of following the Constitutional requirement that neither legislative nor executive departments can in fact intrude upon the powers of the judicial department. The Opinion states, in part:

> ". . . Moreover, ' "it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct. . . ." ' *Richardson v. Young, 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909).* The tension and play among these powers provide restraint and maintain the limits placed on the government in all its departments to protect the rights and liberties of the citizens and to deter abuses of power. . . .
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> "When the thirteen colonies declared their independence from Britain in 1776, one of 'the causes which impel[led] them to the separation' was that the King of Great Britain had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.' Not only had the recent history of the colonies demonstrated that one of the most immediately oppressive and dangerous instruments of repression was a court subject to arbitrary political whims rather than to the dictates of law, but the history of Europe provided glaring examples of the extent to which judicial power

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[22]Constitution, Art II, §§ 1 and 2.

[23]The 3-vote majority did not reject Justice Drowota's reasoning, but simply held that the constitutional issue need not be addressed.

could be abused. The Star Chamber and the Inquisition are sufficient for the point. Before a court whose purpose is to achieve a predetermined, unguided and unrestrained objective, no individual can hope to stand and receive a fair hearing. *A court acting in accord with well-defined procedures and pursuant to the authority of a restraining Constitution and the rule of law, independent of the political system for its term of service and its compensation, was considered essential to the success of a constitutional system and to the preservation of fundamental rights.* As this Court stated at the time of the adoption of the Constitution of 1834, "the independence of the judiciary ought to be anxiously preserved unimpaired; not on account of the individuals who may happen to be judges -- they are nothing -- but on account of the security of life, liberty, and property of the citizen." *Fisher's Negroes v. Dabbs, 14 Tenn. 119, 139 (1834).*

(764 S.W.2d at 188-189; emphasis added)

Unless all of the law—including the law of statutory construction—be followed in judicial decisions in this case, then Sentinel will have been deprived, as it has, of its properties without due process of law, because law does not exist at all except as it is the living force that guides the courts to their decisions.

Question No. 2: **Whether the statute under which the Commissioner claimed to act, the Tennessee Banking Act, apart from the foregoing, is unconstitutional on its face, because it attempts to vest in the Commissioner, a member of the Executive Department of Tennessee's government, certain powers which may be vested only in the judiciary, including the judicial power to appoint receivers, the judicial power to remove corporate directors, and the judicial power to bring about the dissolution of a corporation for insolvency, as well as the legislative power to make provisions of the Tennessee Banking Act applicable or inapplicable to non-banking corporations, at his pleasure**

This question is required to be answered negatively by constitutional principles already set out. The real need for emergency action could easily be achieved by empowering the Davidson County Chancery Court to appoint a receiver and enjoin actions *ex parte* upon a complaint by the Commissioner. With the existing symbiotic relationship between the Department and the banks, who finance its operation and have a right to annual refund of the unused money *(supra,* p. 23), no failed bank, lacking cash due in part to its seizure, can be expected to have attacked this grant of judicial powers to the Executive Department. But as Justice Drowota wrote, when a statute is

unconstitutional, "the presumption of constitutionality afforded statutes, *e.g. State ex rel. Maner v. Leech, 588 S.W.2d 534, 540 (Tenn. 1979),* has been **[*199]** rebutted in this case. I am no less aware that precedent would be partially overruled, but 'the fact . . . that an Act has been construed and enforced and passed upon by this Court is not conclusive of its validity and constitutionality, and this question may be raised at any time when the facts and pleadings justify its consideration.' *Gribble v. Wilson, 101 Tenn. 612, 616-617, 49 S.W. 736, 737 (1899).* Furthermore, 'any [other] rule . . . would lead to entanglements and abuses against which the public should be protected as a matter of public policy.' *Driver v. Thompson, 49 Tenn. App. 646, 652, 358 S.W.2d 477, 479 (1962). . . ." Summers v. Mayor Robert L. Thompson, supra,* 764 S.W.2d at 198-199.

While an express holding of unconstitutionality may be superfluous in view of the overwhelming lack of any authority for the Commissioner's actions herein, an expression of disapproval and an indication of needed remedial legislation would be constructive and in accord with the best traditions of an independent but restrained judiciary.

Question No. 3: **Whether, even if a trust company is within the Commissioner's seizure jurisdiction, the Court can properly empower the Receiver to convey Sentinel's realty, when its ownership is vested in the corporation and the Receiver has received sufficient moneys from collateral liquidations so as not to justify its determination to alienate Sentinel's real property, and whether approval of the Receiver's agreement to convey corporate realty in Davidson County was proper, being as *(i)* the Receiver has no property interest therein, *(ii)* the Receiver was not validly appointed by the order of any court of record so as to empower it to convey corporate properties, and *(iii)* the Receiver did not obtain an evaluation based upon the legal standard for property evaluation, but only an estimate of a reasonable "asking price."**

There can be no doubt but that, from the evidence from Whisenant *(supra,* p.12) as to the validity of Bates' computations, and such computations themselves and facts shown thereby *(supra,* p. 12) demonstrating the relatively small current total of balance of "borrowings" from the trust fund at the time of seizure (the only real negative involved), the extensive receipts of the Receiver from collateral-liquidations, that there remains no real deficiency *if* the Commissioner has required the

Receiver to apply moneys to satisfy the total accounts receivable as to each trust—as he clearly failed to do, *supra,* p. 12), the Commissioner has shown no need to destroy Sentinel's property rights. Such a destruction of ownership should not be permitted without a showing by the Commissioner, in the face of evidence that he has recovered enough money in liquidations to overcome the negatives.

Nor should approval be permitted without requiring an appraisal at market price, instead of a "fair price" for property known to be in a distress sale situation, which is all that was established by the affidavit of Zeitlin (R., I:16-19), this clearly failing to prove what would be a price agreed between *willing* buyer and seller, neither under any strong pressure to make the deal. Any time the power of sale is in the hands of a receiver, an estate executor, or a liquidating trustee, everyone involved *knows* that such seller lacks the freedom of decision either to sell or not, so her opinion does not prove *market value:* The closeness of of two offers (R., I:17, ¶ 7), both from people who knew they were bidding to an official under an *obligation* to sell. There's no reason to arrive at any conclusion but that each was betting on the smallest amount the Receiver eventually would have to take for it, which is why an "asking price" guess approximates a range of sub-value offers expected in such stressed situations.

But, of course, Sentinel's principal ground is a combination of factors: The claimed power to sell was never granted by the terms of the legislation, and this alone should invalidate the sale, particularly when the buyer signed a contract subject to court approval, and the seller had no authority to convey title, having no basis of claim of ownership traceable back either to a chain of registered-deed title or authority based upon illegal appointment. The buyer is clearly subject to the court's power to nullify the sale, because the contract requiring court approval was necessarily made with knowledge that the authority to litigate was wending its way through the courts, subject to reversal at every stage. The "sale," if, indeed, any say was consummated after court approval, was made with knowledge that it might be invalid.

VI. CONCLUSION

Appellants pray that the Court reverse the judgment of the Chancery Court, hold that the Receiver's conveyance, if it has occurred, was void as without legal authority, and that the Commissioner is obligated to take all steps within his power to restore record ownership to Sentinel Trust Company, and restore the *status quo ante* in all respects, and remand the case to the Chancery Court for such actions as may be required to achieve such restoration.

Respectfully submitted,

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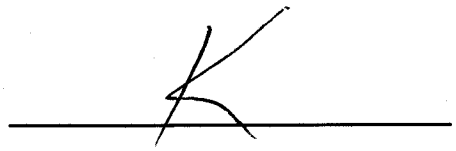

Statutory Addendum

T.C.A. § 1-3-103

1-3-103. Conflicts within code

If provisions of different titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter.

HISTORY: Code 1932, § 13; modified; T.C.A. (orig. ed.), § 1-303.

T.C.A. § 35-3-107

35-3-117. Investment in securities of management investment company or investment trust by bank or trust company -- Fiduciary liability -- Abuse of fiduciary discretion

(a) [Deleted by 2002 amendment.]

(b) [Deleted by 2002 amendment.]

(c) [Deleted by 2002 amendment.]

(d) [Deleted by 2002 amendment.]

(e) [Deleted by 2002 amendment.]

(f) [Deleted by 2002 amendment.]

(g) [Deleted by 2002 amendment.]

(h) Notwithstanding any other law, a bank or trust company, to the extent it acts at the direction of another person authorized to direct investment of funds held by the bank or trust company, or to the extent that it exercises investment discretion as a fiduciary, custodian, managing agent, or otherwise with respect to the investment and reinvestment of assets that it maintains in its trust department, may invest and reinvest the assets, subject to the standard contained in this section, in the securities of any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, *15 U.S.C. § § 80a-1* -- 80a-64. The fact that the bank or trust company, or any affiliate of the bank or trust company, is providing services to the investment company or trust as investment advisor, sponsor, distributor, custodian, transfer agent, registrar or otherwise, and receiving reasonable remuneration for the services, does not preclude the bank or trust company from investing in the securities of such investment company or trust.

(i) In the absence of express provisions to the contrary in the governing instrument, a fiduciary will not be liable to the beneficiaries or to the trust with respect to a decision regarding the allocation and nature of investments of trust assets unless the court determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a fiduciary abused its discretion merely because the court would not have exercised the discretion in the same manner.

(j) If a court determines that a fiduciary has abused its discretion regarding the allocation and

nature of investments of trust assets, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, taking into account all prior distributions to the beneficiary.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions, taking into account all prior distributions, by requiring the fiduciary to withhold an amount from one (1) or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (j)(1) and (j)(2), to restore the beneficiaries, the trust, or both, to the position they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one (1) or more of the beneficiaries or the trust or both.

(k) Upon a petition by the fiduciary, the court having jurisdiction over the trust or agency account shall determine whether a proposed plan of investment by the fiduciary will result in an abuse of the fiduciary's discretion. If the position describes the proposed plan of investment and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed plan of investment, a beneficiary who challenges the proposed plan of investment has the burden of establishing that it will result in an abuse of discretion.

HISTORY: Acts 1951, ch. 125, § § 1-6 (Williams, § § 9596.12-9596.17); Acts 1968, ch. 518, § 1; 1971, ch. 61, § 1; 1974, ch. 634, § 1; T.C.A. (orig. ed.), § § 35-319 -- 35-324; Acts 1989, ch. 288, § 2; 1991, ch. 386, § 1; 2001, ch. 57, § § 1, 2; 2002, ch. 696, § 15

T.C.A. §45-2-1001

45-2-1001. Company authorized to act as fiduciary

(a) No company shall act as a fiduciary in this state except:

(1) A state trust company;

(2) A state bank authorized to act as a fiduciary;

(3) A savings association or savings bank organized under the laws of this state and authorized to act as a fiduciary;

(4) A national bank having its principal office in this state and authorized by the comptroller of the currency to act as a fiduciary pursuant to *12 U.S.C. § 92a;*

(5) A federally chartered savings association or savings bank having its principal office in this state and authorized by its federal chartering authority to act as a fiduciary;

(6) An out-of-state bank with a branch in this state established or maintained pursuant to this chapter, or a trust office authorized by the commissioner pursuant to this chapter;

(7) An out-of-state trust company with a trust office authorized by the commissioner pursuant to this chapter;

(8) A foreign bank with a trust office authorized by the commissioner pursuant to this chapter; or

(9) A private trust company to the extent authorized by the commissioner pursuant to this chapter.

(b) No company shall engage in an unauthorized trust activity. No company shall be deemed to be subject to the provisions of chapters 1 and 2 of this title, regulating fiduciary activities to the extent that the company's activities are permitted by existing statutory authority or are customarily performed as a traditional incident to the company's regular business activities.

(c) (1) A bank authorized to act as a fiduciary (which term includes a trust company, for the purposes of this section and § § 45-2-1002 -- 45-2-1006) having and maintaining paid-in capital and surplus of five hundred thousand dollars ($ 500,000) may be appointed a fiduciary or cofiduciary by any person or any court having jurisdiction and authority to appoint fiduciaries.

(2) When appointed as a fiduciary for a minor or other incompetent person, a bank shall have only the custody, control, management and administration of the property or estate of such person.

(3) The personal care and custody of any minor or other incompetent person shall be committed and confided to those individuals who would otherwise be entitled by law to the guardianship or care and custody of the person of such minor or incompetent person.

HISTORY: Acts 1969, ch. 36, § 1 (3.230); T.C.A., § 45-422; 1999, ch. 112, § § 7, 9.

T.C.A. § 45-2-1003

45-2-1003. Segregation and registration of fiduciary assets -- Nominee

(1) A bank or trust company holding any asset as a fiduciary, cofiduciary, agent for a fiduciary or custodian shall segregate all such assets from any other assets of the bank except as may be expressly provided otherwise by law or by the instrument creating the fiduciary relationship and any such asset may be kept by such bank or trust company.

(2) Stocks, bonds, and other securities may be held by such bank or trust company in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account

are held separate from those of all other estates, trusts, or fiduciary accounts; or, in a manner such that certificates representing securities of the same class of the same issues from time to time constituting assets of particular estates, trusts, or other fiduciary accounts are held in bulk, without certification as to ownership attached; provided, that a bank or trust company when operating under the aforementioned method of safekeeping securities shall be subject to such rules and regulations now in effect or hereinafter promulgated by the state banking board with regard to state-chartered institutions and the comptroller of the currency in the case of national banking institutions.

(3) A bank or trust company holding any such securities in bulk may also merge certificates of small denominations into one (1) or more certificates of large denominations and all banks or trust companies acting as a fiduciary with regard to such securities shall on demand certify in writing the securities held by it for any estate, trust or fiduciary account.

(1) Any bank, when acting as a fiduciary or a cofiduciary with others, or as an agent for other fiduciaries may, with the consent of its cofiduciary or cofiduciaries, if any (who are hereby authorized to give such consent), or the fiduciaries for whom it is acting, cause any investment held in any such capacity to be registered and held in its own name, or the name of a nominee, or nominees, of such bank.

(2) Such bank shall be liable for the acts of any such nominee with respect to any investment so registered.

(3) The records of such bank shall at all times show the fiduciary relationship under which any such investment is held, and the securities, or a proper receipt therefor, shall be in the possession and control of such bank.

(4) Any such securities shall be kept separate and apart from the assets of such bank.

(c) Any bank may deposit funds of a fiduciary account awaiting investment or distribution in its commercial banking department or in the commercial banking department of any affiliate bank in the same bank holding company as defined in § 45-2-1402 where the funds may be used in the conduct of its business to the extent that such deposits do not exceed the aggregate of:

(1) The insurance on such deposits provided by the federal deposit insurance corporation;

(2) Cash on hand;

(3) The value of obligations of the United States or any state or any subdivision or instrumentality thereof owned by the bank; and

(4) Such other property as may be approved for this purpose for national banks or for member banks of the federal reserve system.

HISTORY: Acts 1969, ch. 36, § 1 (3.232); 1974, ch. 550, § 1; T.C.A., § 45-424; Acts 1988, ch. 926, § 6.

T.C.A. § 35-3-1004

45-2-1004. Investment in undivided interest in property.

(a) A bank may, subject to the limitations of this section, create undivided interests in property of any nature for the purpose of sale from time to time to accounts held by the bank in any fiduciary capacity. The bank may retain a portion of such undivided interests for its own account if the property is one which it would be authorized to acquire pursuant to this chapter wholly for its own account.

(b) The limitations on such undivided interest shall be:

(1) The interest shall be one which:

(A) The bank would be authorized to acquire pursuant to this chapter and chapter 1 of this title wholly for its own account, and, in the absence of broader investment powers under the terms upon which it was designated as fiduciary, would also be authorized to acquire as a legal investment for funds held by fiduciaries; or

(B) The bank would be authorized to acquire as an investment by the terms upon which it was designated as fiduciary of each account which acquires an undivided interest therein.

(2) Interests not retained by the bank may be sold only to a fiduciary account.

(c) The bank shall exercise all rights of ownership in respect of an interest in which undivided interests have been sold pursuant to this section, and in respect of any property acquired by foreclosure or otherwise in connection with such interest, in its own name but for the benefit of itself and all other owners of the undivided interests in such property.

(d) The bank shall at all times maintain records of all undivided interests created pursuant to this section showing the extent of the undivided interest of each owner of such interest.

(e) The bank may issue a certificate evidencing each undivided interest created pursuant to this section, keep records showing the holders of such certificates, provide for transfer of a certificate by the registered holder thereof upon surrender of the certificate and deal with the registered holder of a certificate as the owner of the undivided interest represented by the certificate. Each certificate shall contain a summary of the rights of an owner of the undivided interest represented thereby and expressly disclaim any guarantee by the bank of payment of any amount.

HISTORY: Acts 1969, ch. 36, § 1 (3.233); T.C.A., § 45-425.

T.C.A. § 45-2-1005

45-2-1005. Fiduciary bond or oath excused

No oath or bond shall be required of a bank to qualify upon appointment as a fiduciary, unless the instrument creating a fiduciary position expressly otherwise provides.

HISTORY: Acts 1969, ch. 36, § 1 (3.234); T.C.A., § 45-426.

T.C.A. § 45-2-1006

45-2-1006. Deposit of securities in federal reserve bank when acting as fiduciary authorized

(a) (1) Any bank or trust company, when acting as a fiduciary, or when holding securities as custodian for a fiduciary, is authorized to deposit, or arrange for the deposit of, with the federal reserve bank in its district, any securities, the principal of and interest on which the United States, or any department, agency or instrumentality thereof, has agreed to pay, has guaranteed to pay, or has guaranteed payment in such manner so as to be credited to one (1) or more accounts on the books of the federal reserve bank in the name of such bank or trust company, to be designated fiduciary or safekeeping accounts.

(2) The bank or trust company so depositing securities with such federal reserve bank shall be subject to such rules and regulations with respect to the making and maintenance of such deposits as, in the case of state chartered institutions, the commissioner, and, in the case of national banking associations, the comptroller of the currency, may from time to time issue.

(3) The records of such bank or trust company shall at all times show the ownership of the securities held in such account.

(4) Ownership of, and other interest in, the securities credited to such account may be transferred by entries on the books of the federal reserve bank without physical delivery of any securities.

(5) A bank or trust company acting as a custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company with such federal reserve bank for the account of such fiduciary.

(6) A fiduciary shall, on demand by any party to its accounting or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary with such federal reserve bank for its account as such fiduciary.

(b) This section shall apply to all fiduciaries and custodians for fiduciaries, acting on May 3, 1973, or who thereafter may act, regardless of the date of the instrument or court order by which they are appointed.

HISTORY: Acts 1973, ch. 294, § 6; 1973, ch. 384, § § 1, 2; T.C.A. § 45-447.

T.C.A. § 45-2-107

45-1-107. Powers and duties of commissioner

(a) In addition to other powers conferred by this title, the commissioner has the power to:

(1) Interpret the provisions of this chapter and chapter 2 of this title, and regulate banking practices thereunder;

(2) Restrict the withdrawal of deposits from all or one (1) or more state banks where the commissioner finds that extraordinary circumstances make such restriction necessary for the proper protection of depositors in the affected institutions;

(3) Authorize a state bank to participate in a public agency hereafter created under the laws of this state or of the United States, the purpose of which is to afford advantages or safeguards to banks or to depositors and to comply with all requirements and conditions imposed upon such participants;

(4) Order any person to cease violating a provision of this title or lawful regulation issued under this title;

(5) Order any person to cease and desist from engaging in any unsafe or unsound banking practice when such practice is likely to cause insolvency or dissipation of assets or earnings of a state bank or is likely to otherwise seriously prejudice the interests of the depositors of a state bank; and

(6) Bring an action in the chancery court of Davidson County to enjoin any act or practice in or from this state which constitutes a violation of any provision of law or any rule or order which the department has the duty to execute pursuant to § 45-1-104. The court may not require the commissioner to post a bond in bringing such an action. Upon a proper showing by the commissioner, the court shall grant a permanent or temporary injunction, restraining order, writ of mandamus, disgorgement, or other proper equitable relief including the recovery by the commissioner of costs and attorney fees. Further, to the extent that this subdivision does not conflict with other provisions of this title, a receiver or conservator may be appointed for the defendant or the defendant's assets.

(b) The commissioner may remove a director, trustee, officer or employee of a state bank who becomes ineligible to hold such position or who, after receipt of an order to cease under subsection (a), violates the provisions of this title or a lawful regulation or order issued thereunder, or who is dishonest. It is a criminal offense against the state for any such persons, after receipt of a removal order, to perform any duty or exercise any power of any state bank for a period of three (3) years. A removal order shall specify the grounds thereof and a copy of the order shall be sent to the bank concerned.

(c) Notice and opportunity for a hearing shall be provided in advance of any of the foregoing actions in this section taken by the commissioner, except the formulation of regulations of general application. In cases involving extraordinary circumstances requiring immediate action, the commissioner may take such action but shall promptly afford a subsequent hearing upon application to rescind the action taken.

(d) The commissioner may, on petition of any interested person and after hearing, issue a

declaratory order with respect to the applicability to any person, property or state of facts under this title or a rule issued by the commissioner. The order shall bind the commissioner and all parties to the proceeding on the state of facts alleged unless it is modified or reversed by a court. A declaratory order may be reviewed and enforced in the same manner as other orders of the commissioner, but the refusal to issue a declaratory order shall not be reviewable.

(e) In addition to other powers conferred by this title, the commissioner has power to require a state bank to:

(1) Maintain its accounts in accordance with such regulations as the commissioner may prescribe having regard to the size of the organization;

(2) Observe methods and standards which the commissioner may prescribe for determining the value of various types of assets;

(3) Charge off the whole or part of an asset which at the time of the commissioner's action could not lawfully be acquired;

(4) Write down an asset to its market value;

(5) Record liens and security in property or at the option of the bank, insure against losses from not recording;

(6) Obtain a financial statement from a prospective borrower to the extent that the bank can do so;

(7) Search, or obtain insurance of, the title to real estate taken as security;

(8) Maintain adequate insurance against such other risks as the commissioner may determine to be necessary and appropriate for the protection of depositors and the public; and

(9) Call a special meeting of the shareholders.

(f) The commissioner has the power to subpoena witnesses, compel their attendance, require the production of evidence, administer an oath and examine any person under oath in connection with any subject relating to duty imposed upon or a power vested in the commissioner. These powers shall be enforced by a court of competent jurisdiction of the county in which the hearing is held.

(g) No person shall be subjected to any civil or criminal liability for any act or omission to act in good faith in reliance upon a subsisting order, regulation or definition of the commissioner, notwithstanding a subsequent decision by a court invalidating the order, regulation or definition.

(h) The commissioner is hereby granted the power to enact reasonable substantive and procedural rules to carry out the purposes of any and all chapters within the commissioner's regulatory authority as conferred by law. This power shall specifically include, but not be limited to, the authority to establish a schedule of fees to be charged by the department relative to notifications or applications to be reviewed by the department. Such promulgation shall be done in conformity with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

HISTORY: Acts 1969, ch. 36, § 1 (2.012); impl. am. Acts 1971, ch. 137, § 2; Acts 1973, ch. 294, § 12; 1975, ch. 59, § 1; 1978, ch. 516, § 1; T.C.A., § 45-108; Acts 1992, ch. 658, § 1; 1993, ch. 130, § 1; 1994, ch. 551, § 1; 1996, ch. 562, § 2; 2001, ch. 54, § § 1, 2